

Diehl Equipment Company, Inc. and Local Union #469 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, AFL-CIO. Case 28-CA-9333

February 12, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
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On December 29, 1989, the National Labor Relations Board issued a Decision and Order against the Respondent in this proceeding.¹ The Board ordered the Respondent, *inter alia*, to offer immediate employment to and make whole Karl Stahl, Greg Wilson, and John Lehner for any loss of earnings suffered as a result of the Respondent's unlawful refusal to hire them because of their known or suspected union activity. On May 11, 1990, the General Counsel and the Respondent entered into a stipulation that the Respondent waived its right under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying that Order.

A controversy having arisen over the amount of backpay due, the Regional Director for Region 28 issued a compliance specification on July 31, 1990, alleging the amounts of backpay due the discriminatees. The Respondent filed an amended response to the specification on August 29, 1990, admitting in part and denying in part the allegations of the specification.

On October 25, 1990, the General Counsel filed directly with the Board a "Motion to Strike Portions of Respondent's Amended Response to Compliance Specification and Motion for Partial Summary Judgment," with exhibits attached. The General Counsel submits that the Respondent's amended response seeks to relitigate issues previously resolved in the underlying unfair labor practice proceeding and fails to comport with the requirements of Section 102.56 of the Board's Rules and Regulations. Accordingly, the General Counsel moves that the Board strike certain portions of the amended response and grant summary judgment as to several paragraphs of the backpay specification.

On October 26, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On November 13, 1990, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on Motion to Strike Portions of Amended Response and for Partial Summary Judgment

In the compliance specification, the General Counsel asserts, *inter alia*, that: discriminatee Wilson applied for work with the Respondent on February 29, 1988; the backpay period for discriminatees Stahl and Wilson began on March 28, 1988, when the Respondent hired James Carpenter and Larry Quarles; the backpay period for discriminatee Lehner began on October 3, 1988, when the Respondent hired Guy Hermes; and that gross backpay for the three discriminatees should be computed on the basis of hours and wage rates for a representative group of employees, including Carpenter, Quarles, and Hermes, who worked for the Respondent during the backpay periods stated.

In its amended response to the compliance specification, the Respondent denies the assertion that Wilson applied for work. It contends that he "simply made a telephone inquiry." In addition, the Respondent denies several paragraphs of the specification which are premised, in whole or in part, on the hiring, hours, and wage rates of Carpenter, Quarles, and Hermes. The Respondent contends that these individuals were existing employees who were not first hired on the dates set forth in the compliance specification. It further contends that as existing employees they should be excluded from the group of representative employees whose hours and wage rates provide the basis for quarterly gross backpay computations.² Although the Respondent has failed to provide in its amended response any alternative computation setting forth the specific amounts of quarterly gross backpay allegedly owing to the three discriminatees, it contends that such computation can easily be made after excluding information about the hours and wage rates of Carpenter, Quarles, and Hermes from current backpay specification figures.

We agree with the General Counsel that the Respondent's denials with respect to Wilson's application for employment and with respect to Carpenter, Quarles, and Hermes constitute attempts to relitigate issues resolved in the underlying unfair labor practice proceeding. The Board's Decision and Order affirmed specific findings and conclusions by the administrative law judge that: Wilson applied for employment at the Respondent's offices on February 29, 1988, and thereafter made telephone inquiries about employment;³ after Stahl and Wilson had applied for employment, the Respondent hired Quarles and Carpenter on March

²The Respondent also contends that the backpay specification erroneously states that the hourly pay rate for Hermes was \$17.85. The General Counsel has conceded this error and has filed a revised appendix to the compliance specification setting forth the correct hourly pay rate of \$14.25.

³The Respondent's exceptions to the judge's decision did not contest the fact of Wilson's application for employment on February 29.

¹ 297 NLRB 504.

28, 1988;⁴ these and other hirings proved antiunion discrimination against Stahl and Wilson; Hermes left the Respondent's employ sometime after February 13, 1988, but was rehired on October 3, 1988; the hiring of Hermes and two other individuals on October 3, after Lehner had applied for employment, proved antiunion discrimination against Lehner; and, finally, the Respondent's employment records refuted its contention, made in defense of its failure to hire new job applicants Stahl, Wilson, and Lehner, that it limited its hiring to former employees.⁵

Based on the foregoing, we find that all relevant issues concerning Wilson's application for employment and the Respondent's prior employment of Carpenter, Quarles, and Hermes were resolved in the unfair labor practice proceeding. In the parties' May 11, 1990 stipulation, the Respondent waived its right to contest further the findings of fact and conclusions of law in the unfair labor proceeding. In addition, "it is well-settled that matters litigated in the unfair labor practice proceeding can not be relitigated under the guise of avoiding backpay." *Workroom For Designers*, 289 NLRB

⁴The judge set forth in full the Respondent's February 12, 1988 list of current employees eligible to participate in a scheduled representation election. The names of Quarles and Carpenter were not on the list.

⁵The Respondent's exceptions to the judge's decision specifically raised the issue of the judge's alleged failure to find that previous employees were preferred for reemployment and that 9 of the 14 employees hired between February 22 and December 14, 1988, were rehires. The Board's Decision and Order affirmed the judge's findings without comment on this point.

1143, 1438-1439 (1988). Accordingly, we shall grant the General Counsel's motion to strike those portions of the amended response to paragraphs of the compliance specification relating to previously resolved issues, and we shall grant the Motion for Partial Summary Judgment as to those paragraphs of the compliance specification.⁶

ORDER

It is ordered that the General Counsel's motion to strike paragraphs II, IV, VI through XV, and XVII of the Respondent's amended response to the compliance specification is granted.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment with respect to paragraphs 1(b), 2(a) and (b), 4(a) and (b), 5, 6(a)-(e), 7(a)-(c), 8(a), 9(a), 10(a), 13 and 12⁷ of the compliance specification is granted.⁸

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 28 for further appropriate action.

⁶We find no need to pass on the General Counsel's contention that the General Counsel's motions should be granted because the Respondent's pleadings lack the specificity and supporting alternative backpay computations required in Sec. 102.56(a) and (b) of the Board's Rules.

⁷It is undisputed that par. 12 at issue should correctly be numbered as par. 14.

⁸The General Counsel acknowledges that a hearing is necessary on the issues of interim earnings, related quarterly expenses, and net backpay as it relates to net interim earnings.